Supreme Court, U.S.
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No. 07-

IN THE
Supreme Court of the United States

MAJOR FRANK MATREALE,

Petitioner,

v.

STATE OF NEW JERSEY
DEPARTMENT OF MILITARY AFFAIRS
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the intra-military immunity doctrine, judicially created in *Feres v. United States*, 340 U.S. 135 (1950), exceeding the scope of the statutory language from which it was derived, should, after 50 years of judicial and academic criticism, as well as repeated requests for this Court to re-review the doctrine, including such a request by a member of the Circuit Court panel below, is overbroad and fails to meet the judicially created purpose of promoting military discipline?

2. Whether the Constitution allows the extinguishment of a claim by, and whether the *Feres* doctrines reaches to, a state Guardsman who was and remains under State control, who has a state statutory claim, exclusively under state law against that State Department of Military Affairs, and not against the United States, and who, according to prior, established law, acts as a State, and not a federal actor?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is a New Jersey resident who was serving in the New Jersey Army National Guard under orders issued pursuant to 32 U.S.C. § 502(f) when, he alleges, his career was stymied as a result of retaliation for his participation in an investigation which found sexual harassment. Respondent is the State of New Jersey Department of Military Affairs. The United States is the Intervenor.

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Petitioner Colonel Frank Matreale respectfully submits this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 487 F.3d 150 (3d Cir. 2007). App., *infra*, 1a-22a. The opinion of the United States District Court for the District of New Jersey is reported at 418 F. Supp. 2d 603 (D.N.J. 2006). App., *infra*, 22a-36a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on May 22, 2007. A petition for a writ of *certiorari* was filed on October 19, 2007. By application granted August 10, 2007 the Court granted an extension of time within which to file a petition for a writ of *certiorari* to and including October 19, 2007.

STATUTES INVOLVED

The Federal Tort Claims Act, 28 U.S.C. § 2671 provides, in relevant part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or punitive damages.

28 U.S.C. § 2674.

> The provisions of this chapter and section 1346(b) of this title shall not apply to
>
> > (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

28 U.S.C. § 2680.

> "Employee of the government" includes officers or employees of any federal agency, members of the military . . . members of the National Guard while engaged in training or duty under section 502 of title 32.

28 U.S.C. § 2671.

REASONS FOR GRANTING THE PETITION

This Petition raises both a question relating to the continuing vitality of the "*Feres*" doctrine and, more specifically, a question as to whether the doctrine applies to a state National Guard actor, serving in a state capacity and under state direction, who has brought an action against the State of New Jersey for a state statutory violation not implicating the FTCA. Consequently, the second issue is whether intra-military immunity can reach state Guardsmen absent express federal pre-emption.

As to the first issue, the *Feres* doctrine, as established by *United States v. Feres*, 340 U.S. 135 (1950), has, for fifty years, been the subject of continual

criticism. In fact, in the Third Circuit's decision, Circuit Court Judge Smith felt compelled to write a separate concurrence in order "to note that this Court, again and again, has dutifully applied the *Feres* doctrine in spite of perceived injustice and possibly in opposition to the actual text of the FTCA, but noting that we are bound to do so unless and until the Supreme Court or Congress tells us otherwise." (App. 18a) In doing so, he cited no less than ten cases from the Third Circuit alone, where various Circuit Court Judges from that Court, including many jurists of singular note and reputation, had, in the words of one had "urge[d]" this Court to "grant certiorari and revisit what we have wrought" with *Feres*. (App. 18a) (*quoting Richards v. United States*, 180 F.3d 564, 565 (3d Cir. 1999) (Rendell, *J.*, dissenting from a denial of a petition for rehearing *en banc*). Commentary also criticizes the basis and results of this anomalous doctrine. *E.g.*, Turley, *Pax Militaris: The Feres Doctrine*, 71 GEORGE WASHINGTON L. REV. 1 (2003); Schwartz, *Making Intramilitary Tort Law More Civil: a Proposed Reform of the Feres Doctrine*, 95 YALE LAW JOURNAL 992 (1986). This case, inasmuch as it presents a situation where, at a minimum, as discussed immediately below, there has been a specific extension of *Feres* beyond what this Court has previously ruled upon, and this extension conflicts with other precedent, including rulings from this Court, defining state national guardsmen as state actors, should allow for the opportunity to revisit *Feres*.

As to the second issue, as set forth below, this case presents a situation where *Feres* is being extended to and applied in a situation far beyond its mooring in the Federal Tort Claims Act. Indeed, the claim is brought against the *New Jersey* State Department of Military Affairs, an

entity that is an arm of the State of New Jersey and which exists under the control of the Governor of the State of New Jersey. The Petitioner-Plaintiff was an employee of the State of New Jersey under well-established precedent from this Court, as well as other courts because he was a Guardsman under Title 32, 32 U.S.C. § 101, *et seq.* The difference between Title 32 and Title 10, 10 U.S.C. § 101, *et seq.*, is well-established and, as relevant here, conflicts with the very grounding of the *Feres* in the Federal Tort Claims Act and the recognition that a person serving in the military either serves under the State (under Title 32) or under the Federal (under Title 10) sovereign, but not both at the same time, a distinction with a grounding in the Constitution and its precepts of federalism.

STATEMENT OF THE CASE

In 1999, then Colonel Matreale was serving in the New Jersey Army National Guard (hereinafter NJARNG) as a Recruiter. Colonel Matreale was serving under the State Adjutant General, a New Jersey constitutional officer. In or about 1999, an enlisted female officer was sexually harassed by her superior Sergeant Major. Col. Matreale supported the claim of sexual harassment by providing a witness statement. As a result, he alleges in the present action that he suffered retaliation by the NJARNG in the form of negative reviews and failure to promote. In 2003, he brought suit in New Jersey State Court asserting a New Jersey State law statutory claim against the New Jersey Department of Military Affairs.

The United States, against whom no claim has been presented nor against whom no claim could be brought, intervened and removed this case to the District of New Jersey. There, the defendants – NJARNG and the United States – moved to dismiss the case on a motion for summary judgment asserting intra-military immunity. The federal district court, on March 8, 2006 granted the motion. The Third Circuit affirmed solely based upon intra-military immunity. 1a-21a.

ARGUMENT

I. The Feres Doctrine Should Be Reexamined, Or Limited, By This Court.

The *Feres* doctrine of intra-military immunity, precluding service men from suit for incidents "related to" service is historically rooted in the Federal Tort Claims Act ("FTCA"). Notwithstanding the breadth of the doctrine, which has accumulated after decades of expansion, the doctrine lacks textual support. Very simply, the FTCA states that combatants during time of war are precluded from bringing suit against the United States. Despite the clear reach of this term's statutory exclusion, this Court in 1951 effectively wrote out the term "combatant activity" and replaced it with a far broader "incident to service" test, effectively excluding any claim for money damages against the United States by a member of the United States military. In this case, as set forth in the next argument, the court below has now expanded the reach of the doctrine to include state guardsmen claims under state statutory law in situations far removed from any fair conception of what constitutes a "combatant's" activity.

The FTCA was initially taken up in *Brooks v. United States*, 337 U.S. 49 (1949). There this Court held that servicemen may sue the United States under the FTCA for injury "not related" to service. The Court recognized that there are 12 clearly defined exclusions within the FTCA itself. *Brooks* at 51 citing 28 U.S.C. 2680. One exception is for "combatant activity". *Id.* at 51. *Brooks*, though, left open whether injury "related to service" would supplant the definition of the Act's term "combatant activity".

The Court addressed this issue next in *Feres v. United States*, 340 U.S. 135 (1950). *Feres* expanded the terms "in times of war" and "combatant activity" to anything "related to service". It is an understatement to say that this expansion by the Court – what could be considered judicial legislating – has been the subject of strong criticism and confusion. *See, e.g., Taber v. Maine*, 67 F.3d 1029, 1038-53 (2d Cir. 1995). From judges in the federal judiciary who have had to apply the doctrine notwithstanding what to them appeared to be inequitable and unjust results, a chorus of criticism has long been forthcoming, as is captured by the concurrence in the decision in this case:

> "As Justice Scalia stated in his oft-cited *Johnson v. United States* dissent, the exception in § 2680 (j)" [the exception for combatant activities in time of war] "illustrates that 'Congress specifically considered, and provided what it thought needful for, the special requirements of the military. There was no proper basis for [the Supreme Court] to supplement–i.e. revise–the congressional disposition'".

App. at 20a. The *Johnson* dissent captures this Court's constitutional over reach and itself provides the

jurisprudential reasoning for granting *certiorari*. *Feres* reasoned that the term "person" within the FTCA, particularly that the United States government would be liable as any "person", must preclude suit against the military because no "person" can raise an army. No "person", though, can deliver first class mail, approve drugs to market, or do any function within the peculiar province that Congress sets out for the federal government and yet these federal employees have no such preclusion.

The second, the "fairness" rationale for the doctrine enunciated in *Feres* is that the military stations soldiers throughout the United States, and that it would be unfair to have recovery rise and fall based upon situs of the injury. Nonetheless, this, to proves too much since other, non-military service related federal government activities can similarly rise and fall upon where the government stations its work force. Just as military personnel can be deployed in different states, so, too, can federal workers be required to work where employment is required, or stationed such as Marshals, Federal Emergency Management Agency employees, Federal Bureau Investigation employees, etc. The list is probably as broad as any federal job title manual. Yet, claims incident to service for those federal employees and personnel are permitted which are routinely governed by the law of the state where the injury arose.

Finally, while to preclude all suits does indeed create uniformity, uniformity *per se* is hardly an equitable result and, for the vast majority of situations, the differences between state's laws are in matters of detail not in fundamental reach.

The third *Feres* rationale of exclusivity of the worker's compensation, or Veteran's Benefit Act (VBA) allowance, has similarly been discredited. The *Johnson* dissent recognized that there is no such exclusivity, relying upon *Brooks v. United States*, 337 U.S. 49, 51-52 (1949) and *United States v. Brown*, 348 U.S. 112 (1954). Quoting the *Johnson* dissent: "the presence of an alternative compensation system [neither] explains [n]or justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable." *Hunt v. United States*, 636 F.2d 580, 598 (1980).

The *Feres* doctrine rationale which persists today as currency, is the perception that permitting suit would have an unacceptable negative impact upon military discipline. But Congress did not so write in the Act. Congress imposed a limitation on suit to situations involving "combatant" activity. The doctrine therefore is founded upon a judicial perception of what public policy should be, rather than upon the legislative intent of what the law actually is and states. Ironically, it is considered that the effect of the policy could well be inimical to military discipline itself. *Id.*; *see* Schwartz, *supra*, 95 YALE LAW JOURNAL at 1007. When members of the military believe they can act with impunity and without recourse, except for the chance of a military tribunal acting itself, these unaccountable over-reaches can have deleterious consequences for subordinates, the image of the military, and some might argue that in some cases, actually impinges upon the image of the country and uniform abroad where perceived lack of accountability may result in combat errors.

Feres has expanded to deny all forms of recovery by servicemen irrespective of Congress' limited exceptions. In *Chappelle v. Wallace*, 462 U.S. 296 (1983) the Court held, for instance, that pursuant to *Feres*, a service man may not pursue a *Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971) claim because military discipline is a special factor. Ultimately, this means regardless of how egregious the constitutional violation, and no matter how intentional was the act against the service man, there can be no suit.

In *United States v. Stanley*, 483 U.S. 669 (1987) this Court found unqualified immunity for unauthorized, and patently illegal medical testing, on soldiers who volunteered to provide themselves for chemical warfare apparel testing, but instead were dosed with lysergic acid diethylamide, *i.e.* LSD. This Court declined even to apply a standard which would allow suit for conduct "so egregious that no responsible officer would" believe immunity could exist. *Id.* at 681. Instead it indoctrinated the *Feres* "incident to service" test, precluding service such that no suit can be brought for any actions which were incident to service.

The approach taken in *Stanley* affirms the result in *Gaspard v. United States*, 713 F. 2d 1097 (5th Cir. 1983) which denied suit under *Feres*, where the Petitioners were subject to nuclear explosions while stationed in open trenches. These soldiers were then directed to march into the nuclear fall out. The plaintiffs therein reasonably alleged the orders were knowingly and intentionally given with the understanding that the consequences of these orders would have debilitating and fatal consequences upon these troops. Despite the

inhumanity of this result, the Fifth Circuit was required to apply the "incident to service" standard.

What stands now is a judicially created doctrine precluding suit on the happenstance of whether it is "related to service", regardless of what impact such a suit would have upon military discipline. As it stands, courts must acquiesce in needless brutality, self-inflicted against our nation's troops. In this case it permitted a scheme whereby an officer's career was harmed when he sought to protect soldiers from oppressive harassment. This Court could, for instance, employ a standard that an exception to the "combatant" exclusion exists for suits alleging intentional conduct outside of conduct in a theater of engagement. Certainly, standards can be derived which would permit courts to act as appropriate gate keepers.

II. The Extension of the *Feres* Doctrine to A National Guardsperson While Acting Under Title 32, And Not Title 10, Was Error And Conflicts With Otherwise Established Precedent.

The trial court below aptly characterized the issue as to whether *Feres* should extend to the State National Guard serving under command of a State Governor as one of first impression: "Neither the Supreme Court nor the Third Circuit have been presented with a case where, as here, a guardsman has brought a state statutory claim against a state department of military affairs." App. 30a. Logically, a State national guardsperson bringing suit against a sovereign State should have nothing whatever to do with the Federal Tort Claims Act or even federal law. It cannot be held, nor implied, that an issue of

preemption is presented. The question should be whether or not the New Jersey Supreme Court would apply intra-military immunity to its State Guardsmen.

Irrespective of whether *Feres* should apply to other individuals, it certainly should not apply to State Guardspeople. In enacting the FTCA, Congress specifically included such personnel under its definition of national guardspeople but there is a significant distinction that has been lost in this case because individuals in the national guard have been found to be state employees under established law, even by decisions of this Court when they are under Title 32, as opposed to Title 10. As has been recognized, while Guardsmen may have dual enlistment status, they can only serve one sovereign at any given time, *Perpich v. Department of Defense*, 496 U.S. 334, 338 (1990), and, in this case, at least, Petitioner was serving the New Jersey guard and not engaged, in any manner, in a combat role or other role for the federal army. Under *Perpich* a Guardsmen is a State employee unless and until activated under Title 10, or federal training as provided in the statute. *Id.* at 345-47.

The Third Circuit's reasoning below in expanding *Feres* is unconstitutional inasmuch as it negates the dual enlistment principles set forth in *Perpich*, which, in turn, are grounded in effectuating the terms of the Constitution itself. *Perpich* at 340-45 (describing Congress implementation of the constitutional federal/state compromise.)

The result of extending *Feres* to the States' National Guardspeople when they serve in Title 32 capacity was

premised upon the conclusion that Petitioner was a federal or dual actor, as opposed to a state employee. (Appendix 11a; 13a) ("Matreale attained dual status as a member of both the National Guard of the United State and the NJARNG when he accepted his commission as an officer.") The opinion recognized that Matreale was acting under 32 U.S.C. § 502 (f) which provides that a Guardsman may be called into a federal training program under federal regulation. (App. 10a) In reaching its result, the Third Circuit turned established law, and that of other courts, on its head in finding that Guardsmen are federal employees. *Karr v. Castle*, 746 F. Supp. 1231, 1237 (D. Del. 1990) *aff'd U.S. v. Carper*, 22 F.3d 202 (3rd Cir. 1994):

> The intent of Congress was more fully set forth in H.R. Rep. No. 943, 97th Cong., 2d Session 31 (1982), which stated that 'the intent of Congress was, and is, that National Guard personnel serving in the 'Full-Time Manning Program' now included in a DOD program called Active Guard and Reserve (AGR) serve under 32 U.S.C. 502 (f) in conventional National Guard status, i.e. under state control, as opposed to service in the active military service of the United States in Reserves of the Army or Reserves of the Air Force status'. Thus, National Guard AGR personnel are on full-time duty under state control, and are not automatically bestowed the benefits and privileges of federal service.

See Kise v. Department of Military and Veterans Affairs for Pennsylvania, 574 Pa. 528, 540-41 (2003) (Guardsmen

are state employees). Similarly, it was recognized by *State Department of Military and Veterans Affairs v. Bowen*, 953 P.2d 888, 899 (Alaska 1998) (same), relying upon *Maryland v. United States*, 381 U.S. 41, 48 (1965):

> their appointment by state authorities and the immediate control exercised over them by the states makes it apparent that military members of the guard are employees of the state's, and so the courts of appeals have uniformly held.

See also Jaffee v. United States, 663 F.2d 1226 n.7 (3rd Cir. 1981) (recognizing that absent call-up under Title 10, Guardspeople are State employees); *Amico v. New Jersey National Guard*, 577 A.2d 1298, 1299, 242 N.J. Super. 634, 636 (App. Div. 1990) (same); *Clark v. United States*, 322 F.3d 1358, 1366 (Fed. Cir. 2003) (same).

The Third Circuit's creation of a "dual" status, at least as is here relevant, thus fails to comport with this Court's recognition that only one status or hat can be worn at any one single time. *Id.* at 348. This is because, while *Perpich* held that the Commander in Chief has absolute authority to activate under Title 10, unless and until he makes this political decision, the Constitution provides a balance, and particularly the Congressional mandate of the Act interpreting the constitution requires that Title 32 officers are State employees. *See also, e.g.*, 18 U.S.C. § 1385 precluding federal force from acting as a *posse comitatus* except in limited statutorily defined emergencies; *see also C.J. Vuinovich*, 599 A.2d 548, 552, 252 N.J. 122, 131 (App. Div. 1991) (National Guard is a subdivision of the State).

The decision below thus dangerously impacts the constitutional and legislative implementation of the dual enlistment program, turning the established law on its head and creating, wholesale, a new "dual" status. Col. Matreale was a New Jersey State employee at the time of the occurrence, suing under State law. There is no federal reach to preclude such suit, absent an erasure of *Perpich* and the Constitutionally mandated dual enlistment program, which was balanced in order to avoid dual sovereignty.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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